Freeing Public Broadcasting from Unconstitutional Restraints

In 1967 Congress established the Corporation for Public Broadcasting (CPB) to disburse federal funds to public broadcasting stations and program producers.[1] CPB's creation raised considerable concern that this unprecedented governmental subsidy would influence program content and inhibit freedom of expression.[2] The recent report of the Carnegie Commission on the Future of Public Broadcasting (Carnegie II) demonstrates that this concern was well founded.[3] Indeed, the safeguards of the Public Broadcasting Act of 1967 and the Public Telecommunications Financing Act of 1978[4] provide inadequate protection from the governmental control accompanying the government subsidy.[5]

This Note argues that direct subsidy of expression through the current institutional structure of CPB and its operating entity, the Public Broadcasting Service (PBS), violates the First Amendment. The Note first demonstrates that CPB and PBS are sufficiently linked with the government to come within the state action doctrine, and thus are bound by constitutional restrictions. Analyzing the structure of public broadcasting, the Note determines that the current system creates unconstitutional prior restraints on expression. The Note examines the structural and financial modifications proposed by

1. *See* Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §§ 390-399 (1976)). Public broadcasting stations, distinguished from other stations by their lack of advertising, are owned and operated by universities, local school boards and communities. This Note will focus on public television, rather than public radio, because of the former's greater influence and share of the subsidy.

2. *See, e.g., The Public Television Act of 1967: Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 9 (1967) (statement of Sen. Pastore) (need to protect programming from federal interference) [hereinafter cited as *Hearings on S. 1160*]; *Public Television Act of 1967: Hearings on H.R. 6736, S. 1160 and H.R. 4140 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 105 (1967) (statement of Rep. Brown) (uneasiness at precedent of government support for mass medium) [hereinafter cited as *Hearings on H.R. 6736*].

3. CARNEGIE COMM'N ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST (1979) (noting public broadcasting's manipulation by government because of lack of insulation and adequate funding) [hereinafter cited as CARNEGIE II].

4. Pub. L. No. 95-567, 92 Stat. 2405 (1978) (codified at 47 U.S.C.A. §§ 390-399 (West Supp. 1979)).

5. Congress recognized that the First Amendment forbids governmental supervision of expression. *See* 47 U.S.C.A. § 398 (West Supp. 1979) (United States department, agency, officer, or employee forbidden to exercise direction, supervision, or control over public broadcasting, CPB, or grantees). This restriction, however, does not apply to either CPB or the Public Broadcasting Service (PBS); they are separate nonprofit organizations, *see* notes 11 & 20 *infra*, and were established to perform supervisory functions, *see* 47 U.S.C.A. § 396(g) (West Supp. 1979) (delegation to CPB of plenary supervisory authority).

Carnegie II and demonstrates the inadequacy of those recommendations. It then suggests adoption of a constitutionally acceptable alternative to the present structure that severs the state action nexus by institutional and financial reform of the mode of appointment to, and funding of, the public broadcasting system.[6]

I. The Federal Government and Public Broadcasting

The mode of subsidy created by the Public Broadcasting Act inextricably involves the government in programming determinations. This government involvement makes CPB and PBS state actors, subject to the requirements of the First Amendment.

A. *The Structure of the Public Broadcasting System*

Although public broadcasting has had a long history in the United States,[7] Congress did not address the financial difficulties of public stations until the 1960's.[8] In 1965 the Carnegie Commission on Edu-

6. Some commentators have argued that the federal government has an affirmative duty to make opportunities for expression available. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 629 (1970); *cf.* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 17 (1948) (Congress responsible for promoting free speech to cultivate general intelligence). *See generally* Comment, *Access to State-Owned Communications Media—The Public Forum Doctrine*, 26 U.C.L.A. L. REV. 1410, 1411 n.3 (1979) (citing commentators arguing for affirmative right of access). As this Note argues, it is not the subsidy per se for public broadcasting that is objectionable but, rather, the conditions attached to the subsidy: when funding is triggered by the content of speech and not the fact of the speech itself, federal support cannot withstand constitutional scrutiny. *Cf.* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1130-32 (1979) (arguing that support for broadcasters raises political "establishment clause" concerns; dangers of overtly political presentations diminished when regulatory safeguards exist). *But see* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (distinguishing religion and speech clauses and rejecting existence of an establishment clause for speech).

7. The first public radio station began broadcasting in 1919, J. MACY, TO IRRIGATE A WASTELAND 5 (1974), the first noncommercial television station in 1953, *id.* at 10. There are currently 276 noncommercial television stations. TELEVISION DIGEST, Aug. 27, 1979, at 1.

8. Noncommercial broadcasting experienced financial difficulties from its inception because advertising on public stations is impermissible and private support has been erratic. *See Public Broadcasting-1973: Hearings on H.R. 4560, H.R. 6872, H.R. 8538 and S. 1090 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 96 (1973) (statement of McGeorge Bundy) (figures demonstrate fluctuation of Ford Foundation support). Moreover, because two-thirds of noncommercial television stations broadcast on the less desirable UHF band, *see* FEDERAL COMMUNICATIONS COMM'N, COMPARABILITY FOR UHF TELEVISION: A REPORT TO THE U.S. CONGRESS BY THE FCC (Dec. 1978), and VHF frequencies are unavailable in most of the larger markets, *see* 47 C.F.R. § 73.606(b) (1979) (table of assignments showing few noncommercial stations with VHF frequencies in largest markets); CARNEGIE II, *supra* note 3, at 314, fewer viewers, and thus fewer potential contributors, have access to such stations.

Pressure for federal support increased throughout the 1950's and a federal subsidy for public broadcasting facilities was initiated in 1962. *See* Act of May 1, 1962, Pub. L. No. 87-447, 76 Stat. 64 (codified at 47 U.S.C. §§ 390-394 (1976)).

cational Television (Carnegie I) was established to assess the overall needs of public broadcasting; it recommended that a nonprofit Corporation for Public Television be created to receive and disburse federal funds.[9] In response to the report and presidential endorsement,[10] Congress established CPB as a partial embodiment of the Carnegie I recommendations.[11]

CPB distributes a fixed percentage of the federal funds it receives directly to broadcast licensees for their discretionary use through Community Service Grants (CSGs).[12] It retains the balance for administrative expenses,[13] research and interconnection operating costs,[14] and for program production funding.[15] To enhance its control over this funding, Congress established several mechanisms such as annual reports and government audits.[16] Congress also enacted measures to guide station conduct and to facilitate direct supervision of station performance.[17] These provisions closely involve the government in the public broadcasting system.[18]

9. CARNEGIE COMM'N ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 36-41, 68-73 (1967) [hereinafter cited as CARNEGIE I]. In 1977, CPB and other federal agencies provided $135 million of the total public broadcasting income of $482 million. CARNEGIE II, *supra* note 3, at 104.

10. *See* The State of the Union, 3 WEEKLY COMP. OF PRES. DOC. 26, 30 (Jan. 16, 1967).

11. *See* Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 368 (codified at 47 U.S.C. § 396(b) (1976)) (establishing CPB as nonprofit corporation in District of Columbia).

12. *See* 47 U.S.C.A. § 396(k)(3)(A) (West Supp. 1979). Appropriations are linked, on a matching basis, to the total amount of nonfederal financial support received by public broadcasting in the fiscal year prior to the fiscal year that precedes the year of appropriation. *See id.* § 396(k)(1)(B) & (C). Each station is given a basic grant, equal to 0.1% of CPB's total appropriation. The remainder allocated to CSGs is distributed according to a formula using the particular station's share of the total nonfederal income received by all stations. The stations may use such funds for acquisition, production, and dissemination of programming, for maintenance and development of program-related facilities, and for development and use of broadcast technology for programming purposes. *Id.* § 396(k)(8). As of fiscal 1980, the CSG "flow-through" to stations cannot be less than 50% of the CPB appropriation. *Id.* § 396(k)(1)(B), (C) & (3)(A).

13. Administrative and operating expenses generally cannot exceed 5% of the disbursement to CPB. *Id.* § 396(k)(3)(B)(iii), (C) & (D).

14. The interconnection is the satellite linkage that connects the program dissemination center to the stations. *See* CPB, ANNUAL REPORT 1978, at 3.

15. 47 U.S.C.A. § 396(k)(3)(B)(i) (West Supp. 1979). A "significant portion" of the remainder, interpreted as being 25% of the CPB appropriation by fiscal 1981, is to be allocated to national programming. H.R. REP. No. 1774, 95th Cong., 2d Sess. 30, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5389, 5396.

16. 47 U.S.C.A. § 396(i)(1), (*l*)(2) (West Supp. 1979).

17. *See, e.g., id.* § 396(*l*)(3)(A) (use of uniform accounting principles); *id.* § 396(*l*)(3)(D) (CPB and Comptroller General access to licensee books and records). Stations are subject to "sunshine" and equal opportunity in employment rules. *Id.* §§ 396(k)(4), 398(b). In addition, licensees cannot editorialize or endorse political candidates. *Id.* § 399(a).

18. *See* pp. 724-27 *infra*. In addition to its control over funding, the government is closely involved with the selection and duties of CPB's directors. The directors are nominated by the President with the advice and consent of the Senate. 47 U.S.C.A.

CPB is prohibited from owning or operating a system of dissemination or a public telecommunications system, and from producing, scheduling, or disseminating programs.[19] In response to this restriction, CPB established PBS, a separate nonprofit corporation with public television station membership, to manage the interconnection system and to schedule and distribute programs.[20] PBS's autonomy is manifested both by the annual election of its directors by the managers of member stations[21] and by the lack of direct financial support from the government.[22] However, although PBS is consulted as to the programs that CPB funds, PBS's role is not significant because all decisionmaking authority for those programs rests with CPB.[23] PBS does operate the satellite and telephone interconnection network but CPB retains ultimate control of the interconnection.[24] PBS

§ 396(c)(1) (West Supp. 1979). Furthermore, Congress has delegated to the directors plenary authority, particularly in the area of programming. *Id.* § 396(g)(2)(A)-(I). In carrying out CPB activities, however, the directors are charged with assuring "maximum freedom" from governmental interference with, or control of, program content. *Id.* § 396(g)(1)(D).

19. 47 U.S.C.A. § 396(g)(3) (West Supp. 1979).

20. Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1121, 1156 (1974).

21. *See* BROADCASTING, July 2, 1979, at 68-69. PBS voted in 1979 to radically reorganize itself by separating programming functions from other PBS activities, creating three national PBS networks, and strengthening the central programming executive. *See id.* at 66-67; N.Y. Times, Dec. 23, 1979, § D, at 33-34 (station independence subordinated to networking). Despite this reorganization, decisionmaking within each of the three PBS "networks" is not expected to change materially. Interview with Jane Brantley, PBS Programming Dep't, in Washington, D.C. (Aug. 27, 1979) (procedures will not change, "just different people") (notes on file with *Yale Law Journal*).

22. PBS derives its revenues directly from fund-raising campaigns ($32.6 million in 1978-79), contributions from private business, corporations, and foundations ($30 million), and indirectly from the government ($21 million for specific programs from federal agencies, $12 million from CPB). BROADCASTING, *supra* note 21, at 68-69.

23. The precise relationship between CPB and PBS has been troubled and remains ambiguous. *See, e.g.*, PUB. BROADCASTING REP., June 22, 1979, at 6 (hoping that "harmonious" relationship will replace "squabbling and bickering"); PUB. BROADCASTING REP., March 2, 1979, at 2 (bilateral talks necessary to resolve problems of "who does what"). Prior to a May 1973 CPB-PBS partnership agreement, CPB had sought to consolidate its authority by forcing PBS to give CPB ultimate decisionmaking authority on support, acquisition, acceptance, and review of programming. CPB, Resolution of the Board of Directors (Jan. 10, 1973). PBS responded by reorganizing to consolidate its power. Negotiations resulted in PBS's operation of the interconnection, the financing of programming and advertising by its members, and increased station grants, with a decrease in funds available to CPB for programming. *See* Joint Resolution of CPB and PBS (May 31, 1973).

24. Although PBS operates the interconnection, any scheduling dispute between it and CPB is appealable to the two chairmen, whose decision is final. *See Authorizations for the Public Telecommunications Financing Act of 1978: Hearings on S. 2883 and S. 2901 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 2d Sess. 181 (1978) (PBS answer to subcommittee questions) [hereinafter cited as *Hearings on S. 2883*]. Because ultimate authority for CPB-funded programs is vested in CPB, the programming process can be controlled by it. *Cf. id.* at 117-18 (statement of Henry Loomis, CPB president) (CPB chairman has veto when programming decisions are appealed to two chairmen).

also directs national program scheduling.[25] Although it never actually produces a program itself,[26] PBS does, however, coordinate the Station Program Cooperative, whereby stations select programs and pool funds for production.[27]

National programming thus is developed in three ways: by station or entity production, through the program cooperative, or through CPB. Most national programming is of the first type; it is either initiated as local productions, produced by stations for national distribution, or acquired from nonstation sources.[28] The program cooperative provides national programming by offering program proposals to the stations after they are submitted to PBS for review and evaluation in relation to overall system needs.[29] CPB has received and will continue to receive program proposals and fund certain productions.[30] The public broadcasting structure is, then, complex and multileveled, providing numerous points at which control of programming can be exercised.

25. In Fall 1979, for example, PBS instituted a prime-time feed to its members, with a four-night national schedule accompanied by nationwide promotion. BROADCASTING, *supra* note 21, at 73.

26. *See* CARNEGIE II, *supra* note 3, at 158.

27. *See id.* at 155 n.5 (describing operation of program cooperative).

28. *See id.* at 156.

29. *See id.* at 155 n.5. The PBS staff review is purely administrative and involves preparation of an abstract of the proposal. The evaluation criteria are flexible and explicitly imprecise. *See Public Broadcasting: Hearings on S. 1090 and S. 1228 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 409-10 (1973) (criteria are relationship to needs, cost-benefit of program proposed, originality, and experience of producer) [hereinafter cited as *Hearings on S. 1090*]. The programs thus chosen are mainstream, successful, and noncontroversial. CARNEGIE II, *supra* note 3, at 59-60. The program cooperative selects programs that are popular and inexpensive, because stations are concerned with the utility of their "program dollar." H.R. REP. No. 1178, 95th Cong., 2d Sess. 34, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5345, 5378.

30. The Public Telecommunications Financing Act of 1978 mandates that CPB fund more programs. 47 U.S.C.A. § 396(k)(3)(B)(i) (West Supp. 1979) (reservation of "significant portion" of appropriation for national programming). In fiscal 1978, CPB spent $19.4 million on national programming, research and development, and on piloting. CPB, ANNUAL REPORT 1978, at 18. CPB will only fund programs through their second season. *See* CARNEGIE II, *supra* note 3, at 157.

In 1979 the CPB board voted to reorganize CPB by establishing a semiautonomous Program Fund in order to better insulate individual programming decisions from the directors. The Program Fund will allocate the CPB appropriation for national programming; a Management Services Division will handle nonprogramming functions. *See* BROADCASTING, June 25, 1979, at 54. The CPB board will hire the Fund director and consider the system's long- and short-term needs. The director, after the vote of the advisory committee, will make the final individual funding decision. The CPB reorganization, however, does not change the present analysis. CPB will continue to set priorities, *see* p. 735 *infra*, and will audit the Fund, *see* BROADCASTING, *supra*.

B. *CPB, PBS, and State Action*

CPB and PBS will be bound by constitutional restrictions only if they are state actors.[31] To determine whether an entity is a state actor, courts look to several elements of the nexus between the government and the institution to ascertain "whether the involvement of the government is so interwoven" as to support a finding of state action.[32] Significant factors in this determination include dependence on government funding, the public nature of the function performed, the extent and intrusiveness of the regulatory scheme,[33] and the totality of the circumstances.[34] Although one federal district court, in *Network Project v. CPB*,[35] found no state action in the public broadcasting structure,[36] a proper application of state action doctrine demonstrates that both CPB and PBS are governmental bodies.[37]

The most significant strand of the state action nexus is that of government funding, the element with which the *Network Project* court began its analysis.[38] The court analogized from cases finding

31. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974); The Civil Rights Cases, 109 U.S. 3, 11 (1883). "State" action tests are operative at the federal as well as state level. *See, e.g.*, Public Utils. Comm'n v. Pollak, 343 U.S. 451, 461 (1952).

32. There is no single test for determining whether there is state action. The decision is reached "by sifting facts and weighing circumstances." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). In general the state action finding depends on whether a governmental character has become "involved" in, Reitman v. Mulkey, 387 U.S. 369, 380 (1967), "insinuated" into, Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961), or "intertwin[ed]" with, Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 548 (S.D.N.Y. 1968), the body whose action is challenged. Governmental involvement need not be direct. *See* Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 217 (D.C. Cir. 1975) (pervasive influence of state-supported universities in N.C.A.A. supports finding that its rules constitute state action).

33. *See* Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

34. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (peculiar facts or circumstances must always be considered).

35. 4 MEDIA L. REP. 2399 (D.D.C. 1979).

36. *Id.* at 2403-08.

37. *See* pp. 725-27 *infra* (under nexus analysis CPB and PBS are state actors); *cf.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 149 (1973) (Douglas, J., concurring) ("difficult to see why [CPB] is not a federal agency engaged in operating a 'press' "). *But cf.* Jennes, *Memorandum of Law*, in CARNEGIE I, *supra* note 9, at 131 ("good possibility" that CPB would be a nongovernmental entity). Although a federal statute, 47 U.S.C.A. § 396(b) (West Supp. 1979), expressly states that CPB is not an agency or establishment of the United States, it does not preclude a state action finding; it only exempts CPB from enactments applicable solely to government agencies. *See, e.g.*, 5 U.S.C. § 551(1) (1976) (defining "agencies" to which Administrative Procedure Act applies).

This Note will not analyze CPB and PBS as state actors under the public function theory of state action because state action can be found under the nexus theory, and thus a showing under the public function approach is unnecessary.

38. 4 MEDIA L. REP. at 2404.

no state action in federal aid to private educational institutions to determine there was no state action in CPB's activities.[39] But, as the *Network Project* court acknowledged, those cases arose in "different factual contexts" from that of CPB and PBS.[40] Unlike the universities, which had other major sources of income, CPB is wholly funded by federal appropriations and PBS depends on federal funds for about one-third of its support.[41] Moreover, PBS receives all funding for its operation of the interconnection from CPB, an involvement that alone might justify a finding of state action.[42] In addition, the tax-exempt status of CPB and PBS and the allowance of charitable deductions for contributions to them confer a government benefit that contributes to a finding of state action.[43]

In performing traditional governmental functions, CPB and PBS satisfy as well the next state-action criterion considered by the *Network Project* court. Each helps to discharge the government's interest in fostering expression.[44] Moreover, Congress has delegated to them its discretionary power to spend government funds.[45] Although the court rightly distinguished cases in which the state action finding under the public function theory was premised on the involvement of racial discrimination,[46] equally numerous cases have employed a public function analysis in situations in which no such discrimination had been alleged.[47]

Additionally, government regulation of CPB and PBS is sufficiently extensive to render them state actors. Although the *Network*

39. *See id.* at 2404-05. Cases cited included Greenya v. George Washington Univ., 512 F.2d 556, 560 (D.C. Cir. 1975) and Spark v. Catholic Univ. of America, 510 F.2d 1277, 1282 (D.C. Cir. 1975). *But cf.* note 43 *infra* (citing line of cases with contrary effect).

40. 4 MEDIA L. REP. at 2404.

41. *See* note 22 *supra.*

42. *See* Canby, *supra* note 20, at 1159 (government funding of interconnection justifies First Amendment scrutiny of PBS).

43. *See* Jackson v. Statler Foundation, 496 F.2d 623, 628 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975) (activities of tax-exempt organizations are infused with state action); *cf.* Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971) (indirect government support of organization by tax exemptions and deductions compels it to adhere to federal policy). The *Network Project* court did not consider this factor in its analysis of the funding element of the nexus.

44. *See* note 6 *supra* (affirmative duty to subsidize).

45. *See* 47 U.S.C.A. § 396(g) (West Supp. 1979).

46. 4 MEDIA L. REP. at 2406.

47. *See, e.g.,* Hudgens v. NLRB, 424 U.S. 507, 513-21 (1976) (analysis applied to shopping center); Marsh v. Alabama, 326 U.S. 501 (1946) (company town performs public function). Although the *Network Project* court indicated that the absence of close monitoring and substantial control of the delegatee's performance by the governmental body precluded a finding that CPB performs a state function, 4 MEDIA L. REP. at 2406, it failed to assess the relationship created by Congress's close supervision of CPB expenditures. Such an assessment would have led to an opposite conclusion.

Project court found that congressional control through the appropriations process is minimized by a five-year authorization period,[48] congressional regulation and control is far more pervasive than the appropriations process considered by the court. CPB was created by Congress;[49] its directors are political appointees[50] with comprehensive, statutorily delegated powers.[51] It reports to Congress annually[52] and may be audited by the General Accounting Office.[53] Officers and employees of CPB and PBS are subject to salary limitations set by Congress.[54] CPB enforces adherence by PBS and grant recipients to federally mandated accounting principles[55] and monitors, with PBS, recipients' compliance with "sunshine" laws and equal opportunity in employment regulations, thus performing oversight functions delegated directly to it by Congress.[56] The statutory scheme, therefore, not only contemplates CPB funding and content regulation, but involves Congress and the executive in the administration of the public broadcasting system. Thus all CPB activities are inextricably linked to, and governed by, federal statute.[57]

The last element of the state action inquiry examines the "totality of the circumstances"; that is, it considers whether the contacts between CPB and the government, taken as a whole, reveal state

48. 4 MEDIA L. REP. at 2407. Actual CPB appropriations, however, occur annually. *See, e.g.*, H.R.J. Res. 440, Pub. L. No. 96-123, § 101(g), 93 Stat. 923, 925 (appropriating funds to CPB for fiscal 1982); Supplemental Appropriations Act, 1979, Pub. L. No. 96-38, 93 Stat. 97, 110 (fiscal 1981).

49. *Cf.* Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153, 163 (6th Cir. 1973) (statute empowering regulated utility makes utility state actor).

50. *See* 47 U.S.C.A. § 396(c) (West Supp. 1979); *cf.* p. 724 *supra* (many factors apposite for state action finding).

51. *See* note 18 *supra*.

52. *See* note 16 *supra*.

53. 47 U.S.C.A. § 396(*l*)(2)(A) (West Supp. 1979).

54. 47 U.S.C.A. § 396(k)(10) (West Supp. 1979). Congress has also expressed concern as to the salaries that PBS officials receive. *See Hearings on S. 2883*, *supra* note 24, at 81-82 (statements of Sen. Hollings and Henry Geller).

55. *See* 47 U.S.C.A. § 396(*l*)(3)(A) (West Supp. 1979).

56. *See id.* § 398(b). The fact that CPB and PBS are the institutions charged with overseeing compliance with the equal opportunity in employment regulations by conditioning grants, obtaining information, and monitoring hiring practices supports the argument that both entities are engaging in governmental activity.

57. The *Network Project* court found that the provisions of the Public Broadcasting Act of 1967 that provide for staggered terms of directors, a bipartisan board, and absence of political tests or qualifications in personnel actions restrict presidential control and demonstrate the separation of CPB from political and, hence, governmental institutions. 4 MEDIA L. REP. at 2407. Provisions similar to those cited by the court for support are, however, often found in the statutes that establish governmental agencies. *See, e.g.*, 47 U.S.C. § 154(c) (1976) (staggered terms of FCC commissioners); *id.* § 154(b) (bipartisanship required for FCC); *id.* § 154(f)(1) (FCC must use apolitical civil service). Thus, the provisions demonstrate how similar CPB is to a state entity, notwithstanding the statutory denial that it is an agency of the federal government.

action.[58] The pervasiveness of federal control through funding, appointment, and accountability, in the aggregate, makes CPB more like a state actor than a private entity. The opportunity for government intrusion is present in so many phases of its operation that the circumstances demonstrate that it has taken on a governmental character.

CPB, as state actor, transforms PBS as well. Both CPB and Congress oversee certain PBS activities.[59] The CPB chairman's power to decide disputes between the organizations makes the operating entity the subordinate of CPB.[60] Thus PBS, as an agent of CPB,[61] takes on the governmental character of its superior. The comprehensive scheme of continuing oversight—of congressional involvement in public broadcasting—renders both CPB and PBS subject to First Amendment doctrines.

II. Prior Restraints and Public Broadcasting

The First Amendment protects the rights of viewers,[62] broadcasters,[63] and program producers.[64] The prior restraint doctrine pro-

58. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722-25 (1961).

59. *See, e.g., Hearings on S. 2883, supra* note 24, at 114 (remarks of Henry Loomis) (CPB can audit PBS functions funded by CPB); *id.* at 137 (congressional inquiry into PBS officials' salaries).

60. *See* note 24 *supra* (CPB ultimately controls). PBS is not, however, entirely powerless and wholly subordinate to CPB. It can, for example, both exercise tight controls over programming not underwritten by CPB and restrict station autonomy. *See, e.g.*, PBS, NATIONAL PROGRAM FUNDING STANDARDS AND PRACTICES *passim* (1976) (detailed recitation of the regulations governing underwriting, credits, promotion). Moreover, PBS approval is required for use of the interconnection for program transmission and its operations in this area are largely autonomous. *Cf.* N.Y. Times, *supra* note 21, at 33, col. 2 (PBS as "traffic cop"). Although PBS program clearance can be bypassed through the satellite, *see* Variety, May 30, 1979, at 64, col. 1, such use is limited and does not affect the network's feed. *See* note 21 *supra* (PBS reorganization will further centralize authority); note 25 *supra* (PBS uniform scheduling). The fact that an institution such as PBS has powers that are not controlled by governmental entities such as CPB or Congress does not, however, affect a conclusion that PBS is sufficiently imbued with a governmental character so as to be a state actor.

61. Network Project v. CPB, 4 MEDIA L. REP. 2399, 2404 (D.D.C. 1979) (court assumes, *arguendo*, PBS is "agent" of CPB).

62. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (noting rights of viewers and listeners in broadcasting).

63. The broadcaster's right to transmit the programs it alone selects has been upheld, within the limits of FCC regulation, in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), and Columbia Broadcasting Sys., Inc. v. FCC, 412 U.S. 94 (1973). *See also* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1133-35 (C.D. Cal. 1976), *vacated on other grounds sub nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979) (independent decisionmaking by local licensees is "constitutional foundation" of broadcasting system).

64. Program producers, as direct recipients of a monetary subsidy fostering speech,

hibits government from restraining expression on the basis of a determination that its content is disfavored or objectionable.[65] Yet the parties involved in public broadcasting are severely injured when CPB and PBS make content-based decisions not to subsidize or disseminate the programs of certain applicants.[66]

Congress recognized that there would be attempts to impose prior restraints from outside the public broadcasting system. It attempted to insulate CPB from these external pressures through such safeguards[67] as CPB's autonomous corporate existence, selection of independent directors, individual station decisionmaking, and public visibility. None of these formal safeguards, however, prevents the system from imposing content-based prior restraints on expression,

occupy a position analogous to performers in auditoriums or speakers in public areas, whose rights are protected. *Cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 554 (1975) (municipal board governing auditorium scheduling cannot review content to determine whether applicant should be granted use of the facility).

65. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931) (press has general "immunity from previous restraints"). *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955). There is a heavy presumption against the constitutionality of any prior restraint. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). Although there are exceptions to the doctrine in that certain speech is unprotected, *see* Times Film Corp. v. City of Chicago, 365 U.S. 43, 47-49 (1961) (liberty of speech, barring prior restraints, not absolute); Near v. Minnesota, 283 U.S. 697, 716 (1931) (wartime, obscenity, incitement to violence or government overthrow create circumstances where speech is unprotected), they are, by and large, inapplicable to public broadcasting.

66. One clear indication that parties suffer real injuries when the government makes content-based decisions is the fact that viewers, broadcasters, and program producers would satisfy the injury requirement to have standing to sue for redress. Significantly, the *Network Project* court recognized that plaintiff-viewers and plaintiff-program producers alleged sufficient First Amendment violations by CPB and PBS in censoring and controlling the content of public broadcasting programming to satisfy the initial standing inquiry. 4 MEDIA L. REP. 2399, 2401-02 (D.D.C. 1979). Standing ultimately was denied because the plaintiffs could not demonstrate a causal connection between their failure to view programs that they desired to see on public television and the challenged activities of the defendants. The court found that even an injunction ordering funding of a program proposal would not necessarily result in its being viewed because stations can reject any program. This argument, however, ignores producers' complaints that the denial of subsidy on the basis of content violates the First Amendment. CPB refusal to fund or PBS refusal to disseminate occurs before the licensees are given the opportunity to reject the program that might otherwise have been produced or distributed. Moreover, broadcaster and viewer plaintiffs have a right to challenge governmental prior restraint at any stage, even though the restraint occurs prior to the actual decision to disseminate. Although there is no guarantee that programming will be broadcast even without prior restraint, government acts of prior restraint ensure that such programs can never be shown. *Cf.* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (voiding rule prohibiting lawyer advertising despite lack of guarantee of consumer access to information).

67. *Hearings on H.R. 6736, supra* note 2, at 101 (remarks of Secretary Gardner) (describing four safeguards); *see* Network Project v. CPB, 561 F.2d 963, 974 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978) ("Congress [has] erected numerous statutory safeguards against partisan abuses.").

both through these very mechanisms and, inherently, through the internal operation of the system's institutional components.[68]

A. *Statutory and External Prior Restraints*

Congress never adequately considered the constitutionality of various provisions of the Public Broadcasting and Public Telecommunications Financing Acts that operate as prior restraints. Whenever those Acts charge the directors with enforcing proscriptions on the content of broadcast speech, or whenever CPB or PBS accedes to external political pressure generated by the statutory structure, expression is unconstitutionally restrained.[69]

1. *Prohibition on Editorializing*

One unconstitutional prior restraint imposed directly upon all noncommercial educational broadcasting stations is the statutory prohibition against "editorializing," or supporting or opposing any candidate for political office.[70] Although commercial broadcasters may editorialize,[71] no public station can do so, even if it receives no federal assistance.[72] The legislative history of the anti-editorializing provision demonstrates an intent to facilitate prior restraint—particularly

68. There is an irony, of course, in arguing that government action that results in supporting some speech simultaneously imposes an unconstitutional burden on other speech. The government, however, cannot violate First Amendment strictures even to achieve admittedly desirable ends. This is particularly so when the government can achieve those same ends through constitutional means. *See* pp. 744-47 *infra* (suggesting ways in which support of public broadcasting can constitutionally be achieved).

69. In addition to the problems of prior restraint discussed in text, another constitutional infirmity of the public broadcasting structure is that the accountability mechanisms by which Congress supervises CPB, PBS, and licensee performance, although facially speech-neutral, cause those entities to engage in self-censorship. This phenomenon is known as governmental chill. *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 822-29 (1969). The doctrine proscribing chill could be invoked to void those statutory provisions such as the annual report, directors' testimony, the CPB audit, and the appropriations process; these facilitate government review of the system's programming. *See, e.g.*, 113 CONG. REC. 26391 (1967) (statement of Rep. Anderson) (Congress should maintain "close scrutiny" and carry out "oversight function" to prevent CPB "misuse" of authority); *Hearings on S. 1160, supra* note 2, at 125 (remarks of Sen. Hartke) (ultimate congressional power to control programming by control of the purse strings). This Note will not, however, apply the chill doctrine to determine the constitutionality of federal involvement in public broadcasting.

70. 47 U.S.C. § 399(a) (1976).

71. *See In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) (overt editorializing not contrary to public interest).

72. 47 U.S.C. § 399(a) (1976). Because virtually all television stations receive the minimum CSG, those broadcast licensees that receive no federal funds are primarily FM radio stations ineligible for CPB assistance.

to avoid commentary on politicians[73]—without presenting any legitimate government interest to be furthered by the prohibition.[74] The broad language and effect of the statute further puts its constitutionality in doubt.[75] The anti-editorializing provision prevents public broadcasting stations, in their role as "private journalists,"[76] from providing the public with the political ideas that they have a right to receive.[77] As an absolute prior restraint on political speech, the prohibition is unconstitutional.[78]

2. *Objectivity and Balance Standard*

The statutory requirement demanding "strict adherence to objectivity and balance" in all "controversial" programs[79] also authorizes an unconstitutional prior restraint on programming. In *Accuracy in Media, Inc. v. FCC*,[80] the Court of Appeals for the District of Columbia

73. *See, e.g.*, 113 CONG. REC. 26391 (1967) (Rep. Joelson) ("a public official is a sitting duck . . . [t]herefore, the right of editorializing should be very, very carefully scrutinized"); Lindsey, *Public Broadcasting: Editorial Restraints and the First Amendment*, 28 FED. COM. B.J. 63, 79-82 (1975) (arguing from legislative history that purpose of § 399(a) was to prevent criticism of government).

74. The only legitimate congressional purpose that could be furthered is oversight of the public broadcasting system. But, this goal is not possible under the absolute ban now imposed, because the speech is never broadcast and thus cannot be reviewed.

75. Even if the interest is one of preventing public perception that a station supports an individual or program solely because of the influence of government funds, the provision is too overbroad to withstand scrutiny. *Cf.* Coates v. City of Cincinnati, 402 U.S. 611 (1971) (statute unconstitutionally broad if it proscribes constitutionally protected conduct). It prohibits constitutionally permitted activity without furthering the arguably legitimate interest. First, it includes those stations that receive no government funds and are wholly private. *See* p. 729 *supra*. Second, the term "editorializing," used in the statute, lends itself to wide disparity in interpretation and enforcement by CPB board members and, consequently, is vague and overbroad. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 856-57 (1970). Finally, it does not allow broadcasting stations to comment on matters entirely local, such as zoning, which are unrelated to federal, or even state, support, and hence, to the asserted interest. *Cf.* Kamenshine, *supra* note 6, at 1144 (fairness doctrine and "equal time" provisions make § 399(a) superfluous in eliminating political establishment effect of funding).

76. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110-11 (1973) (broadcaster has journalistic discretion, balanced against public trusteeship).

77. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (right of public to receive ideas).

78. *Cf.* S. REP. No. 222, 90th Cong., 1st Sess. 4, 11, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 1772, 1775, 1782 (government should "in no way" be involved in programming and stations must remain "absolutely free" in their decisionmaking). One public interest group has sued to invalidate § 399(a) for denying viewers access to editorials and depriving noncommercial broadcasters of the right to editorialize exercised by commercial broadcasters. Complaint for Declaratory and Injunctive Relief, at 4, 5, League of Women Voters of Cal. v. FCC, No. 79-1562 (C.D. Cal., filed April 30, 1979). The FCC and the Justice Department have indicated that they will not defend the provision, agreeing with plaintiffs' contention that § 399(a) is unconstitutional; Congress itself must determine whether it desires to contest the action. BROADCASTING, Nov. 19, 1979, at 72.

79. 47 U.S.C.A. § 396(g)(1)(A) (West Supp. 1979).

80. 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

Circuit held that CPB, and not the Federal Communications Commission, was responsible for enforcing the objectivity and balance standard.[81] Interpretation and application of the provision thus was left to the CPB directors and to Congress in its supervisory capacity.[82] Although government cannot constitutionally interfere with expression on the basis of content,[83] enforcement of the objectivity and balance standard by CPB necessarily involves government discipline of speakers on the basis of the content of the speech they seek to disseminate.[84] Such decisionmaking effectively prevents program production, restrains licensee discretion, and precludes expression from being viewed, if CPB determines, prior to broadcast, that a program fails to meet the standard. The provision thus constitutes an unconstitutional prior restraint.[85]

3. *CPB Board Appointment Process and Membership*

The political mode of appointment to the board and the partisanship requirement facilitate both prior restraints originating from without CPB and internal prior restraints by encouraging directors

81. *Id.* at 297. Although the standard is merely "hortatory," *see Hearings on S. 2883, supra* note 24, at 130, CPB acknowledges that it can use its enforcement as a justification for prior restraint, having conceded earlier that its judgment can be exercised only "from a personal point of view," *Financing for Public Broadcasting-1972: Hearings on H.R. 11807, H.R. 7443, and H.R. 12808 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 84 (1972) (statement of Frank Pace, chairman, CPB) [hereinafter cited as *Hearings on H.R. 11807*].

82. 521 F.2d at 297. The *Accuracy in Media* court held that CPB may apply the standard to individual licensees. *Id.* at 296 n.40. A subsequent judicial reading of the standard has suggested that Congress can directly supervise CPB performance in its content-oversight. *See* Community-Serv. Broadcasting, Inc. v. FCC, 593 F.2d 1102, 1142 (D.C. Cir. 1978) (Leventhal, J., dissenting). The *Community-Service Broadcasting* court discussed CPB's "balance and objectivity" function without any explicit declaration regarding its constitutionality.

83. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 554 (1975). *But see* Community-Serv. Broadcasting, Inc. v. FCC, 593 F.2d 1102, 1149 (D.C. Cir. 1978) (Leventhal, J., dissenting) (Congress can act to minimize partisan perspectives in federally funded programs through facially neutral standard).

84. *See Hearings on H.R. 11807, supra* note 81, at 81 (statement of Frank Pace) (CPB refusal to fund offending producers).

85. Enforcement of the standard by either CPB or PBS is a prior restraint. If either institution disagrees with the other's assessment of a program's balance or objectivity, the matter is referred to a "monitoring committee" composed of three trustees from each body, with a vote of four trustees being necessary to bar a program from the interconnection. *See Hearings on S. 2883, supra* note 24, at 181. Moreover, when applied to "programs or series of programs," 47 U.S.C.A. § 396(g)(1)(A) (West Supp. 1979), the standard may prevent a specific program from being broadcast, not because its intrinsic message is objectionable, but solely because too many other programs have expressed similar sentiments such that the funding or distribution of that individual program would create an imbalance. *See* H.R. REP. No. 794, 90th Cong., 1st Sess. 13, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 1834, 1836 (each program in a series need not be objective and balanced but the entire series, considered as a whole, must).

to manifest their content-biases in their decisionmaking. The CPB directors are selected on the basis of their political affiliation.[86] Thus, the President can severely restrict the range of national programming by appointing individuals whose preferences complement his political goals and attitudes.[87] The process has become politicized to such an extent that the directors, beholden to those who appointed them, subjectively incorporate presidential and congressional preferences into their decisionmaking.[88] Those programming decisions by political appointees can effect structural prior restraints.

The statute's mandate for bipartisan composition of the CPB board encourages both prior restraints that originate outside CPB and those that are internal. Independents and members of third parties effectively are precluded from serving as directors because they will not be appointed by the partisan political branches; the views of those individuals therefore are excluded from CPB decisionmaking and hence from public television programming. Moreover, because board members are denominated by political affiliation, political differences are exacerbated by encouraging awareness of directors' political preferences; the resulting factionalism fosters political manipulation of programming preferences.[89] The bipartisanship provision thus leads to unconstitutional prior restraints.[90]

86. *See, e.g.*, NATIONAL ASS'N OF EDUCATIONAL BROADCASTERS, THE NIXON ADMINISTRATION PUBLIC BROADCASTING PAPERS 1969-1974, at 15 (1979) (1970 Whitehead memo noted that "We can name five Republicans without overbalancing the Board politically") [hereinafter cited as NIXON PAPERS].

87. *See id.* at 15 (1970 Whitehead memo indicated that board is "one of our primary levers" for assuring that CPB programming does not get "overly biased").

88. Directors are clearly tied to the Administration that nominated them. *See, e.g., id.* at 41-42, 46 (Whitehead described board appointees as "loyal friends" who can control CPB and "fire the current staff who make the grants"); *id.* at 62-64 (board member cooperated with Administration by channeling information to White House). They also are accountable to the Congress that approved their nominations. *See* 113 CONG. REC. 13003 (1967) (statement of Sen. Cotton) (if slant, bias, or injustice is apparent, Congress can make directors "uncomfortable" and "shut down" appropriations to CPB). Congress and the Executive have acted individually and in concert to inject politics into the selection process. *See, e.g.*, NIXON PAPERS, *supra* note 86, at 18 (Whitehead recommends black nominee as "wiser political choice"); *id.* at 42 (senator forced reappointment of "known left-winger" over Administration opposition as "price of confirming" Nixon nominees). Although there has been no attempt to transform the nomination process into a political contest since the Nixon Administration, the structure has not changed.

89. Directors, aware that they were selected, in part, because of their political beliefs, may feel obligated to attempt to implement such preferences. *See, e.g.*, NIXON PAPERS, *supra* note 86, at 46 (Nixon appointees "loyal" because they make their political views known on board).

90. The constitutionality of the CPB bipartisanship requirement is more doubtful than that of an independent government agency such as the FCC because congressional intent and the nature of the funding activity make clear that injection of politics into the CPB decisionmaking structure renders impossible the requisite apolitical, principled, institutional program selection.

4. *External Political Pressure*

In attempting to reconcile the desired accountability for federal funds with the evident need for insulation from government interference, Congress created a structure uniquely vulnerable to political interference. Government officials can exercise direct prior restraints by inducing CPB or PBS to withdraw support for proposals or to bar access to the interconnection.[91] Because these prior restraints prevent producers' programs from ever being produced, broadcast, or viewed, they violate the First Amendment.

B. *Structural Prior Restraints—Funding and Dissemination*

Congress also failed to consider the structural prior restraint imposed by the system when CPB, or its Program Fund, decides not to support a particular proposal, when CPB or PBS makes content-oriented decisions to foster certain kinds of programming to the

91. *See, e.g.*, NIXON PAPERS, *supra* note 86, at 41 (October 1971 White House memo indicating that "President's basic objective" was "to get the left-wing commentators who are cutting us up off public television at once, indeed yesterday if possible"). The Nixon Administration attempted to influence CPB programming on a broad scale and asserted that federal funds should not be used either to support directly anti-Administration programming or to aid organizations that produced such programs with nonfederal funds. The signal event in the Nixon Administration's efforts to manipulate the public broadcasting system was the President's veto of a long-range financing bill for CPB. It was clear that that action conveyed the Administration's message that funding would be opposed until more favorable programming was broadcast. *See* Washington Post, Feb. 3, 1972, § B, at 12, col. 1 (Clay Whitehead, Director, Office of Telecommunications Policy, warned that concentrating on controversial programming increased "the danger of provoking control through the public process"); N.Y. Times, June 10, 1974, at 63, col. 3 (Whitehead proposed "deal" that funding would be exchanged for balanced programming). The Nixon Administration also sought to instigate public pressure. *See* NIXON PAPERS, *supra* note 86, at 48-49 (November 1971 memo from Whitehead to H.R. Haldeman explained that Administration concern with liberal bias of certain commentators had been dealt with by planting ideas with trade press as to their adverse effect on public television, by encouraging speculation as to their salaries, by soliciting articles critical of salaries, and by encouraging station manager pressure on CPB and others to balance programming). Even though some of the external pressures on CPB from that Administration might be attributable to the individuals involved, it is the institutional structure of the system that encourages prior restraint. Senator Goldwater, for example, has argued that the Carter Administration has attempted to use its connections with CPB to influence programming. *See* PUB. BROADCASTING REP., June 8, 1979, at 3; PUB. BROADCASTING REP., March 2, 1979, at 6.

Congressmen, too, have attempted to control programming. *See, e.g.*, PUB. BROADCASTING REP., March 16, 1979, at 6 (Rep. McCormack threatens closer look at public television for refusing congressional preview of controversial program). The safeguard of public visibility, relied upon by the Public Broadcasting Act's sponsors, is therefore ineffective because the congressmen charged with transmitting citizen displeasure to CPB exacerbate the political pressures placed on the structure. Ironically, one commentator asserted that the possibility of political pressures on CPB was a strength of the current system, not a weakness. *Hearings on H.R. 6736, supra* note 2, at 355 (remarks of John Kiermaier, president, Eastern Educational Network) (citizen complaints and congressional pressure correct problem of CPB issuing grants only to those who conform to CPB's ideas).

detriment of others, or when PBS bars a program from the interconnection.[92] These decisions constitute prior restraints on individual programs[93] even though CPB and PBS, by their denial, are facilitating expression of other applicants. Moreover, traditional rationales for government regulation of the content of broadcast speech, based on increasing the overall variety of expression disseminated,[94] are inapplicable to a process that selects one program over another for funding or dissemination.[95]

1. *Funding Decisions*

The content-based decisions by CPB to withhold funding from program producers are unconstitutional prior restraints because the proposed programs are never produced, let alone distributed, or viewed.[96] Although CPB's financial control has never resulted in dom-

92. Although station choice assures that government cannot compel the broadcast of particular programs, it is an ineffective safeguard against the restriction of expression because the structural prior restraint occurs before the progams are placed on the interconnection for national distribution.

93. These restraints are not as obvious as attempts to enjoin publication. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (unconstitutionality of injunctive prior restraint). The fact of their subtlety, however, makes them no less an unconstitutional prior restraint on expression. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (devices to limit expression do not have to "fall into familiar or traditional patterns"); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) (expression protected from "subtle governmental interference"). Perhaps because the results of such structural restraints are apparent only in the omission of certain programming from the interconnection and are, therefore, imperceptible to the viewer, the First Amendment violations are even more insidious than the readily perceived, remediable restraints of an injunction. *But cf.* Canby, *supra* note 20, at 1158 (CPB exercise of funding authority raises no First Amendment problems).

94. Supervision by the FCC over content is permissible only when it expands the variety of expression. The FCC regulates content by enforcing the equal opportunity to reply provision and the Fairness Doctrine. *See* 47 U.S.C. § 315 (1976). Such regulation may be justified in that it increases the number and variety of viewpoints broadcast. *Cf.* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1147 (C.D. Cal. 1976), *vacated on other grounds sub nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979) (content regulation permitted only if diversity promoted). The FCC must avoid prescribing the particular speech suitable for broadcast. *See* Commission *en banc* Programming Inquiry, 44 F.C.C. 2303, 2310 (1960) (FCC cannot review program content, with only exceptions being obscenity, profanity, indecency, and programs inciting to riot or inducing commission of crime).

95. Unlike generic selection of programming, such as promoting "opposition views," CPB and PBS scrutiny and approval or disapproval of particular programs that results in the funding of one individual program over one other program where both programs would each increase equally the diversity of programming, does not increase the overall diversity of all broadcast expression.

96. It might be asserted that because there is a potential for alternative funding sources for programming, CPB can constitutionally perform its content-selective function. That assertion fails on both constitutional and factual bases. Speech may not be abridged by denying a subsidy in one place merely because the expression can be subsidized in

ination by an "official government view,"[97] and although direct CPB censorship of completed programs is rare,[98] the CPB funding procedure depends entirely on the appeal that the content of the proposed production has for the directors. CPB selection of proposals for production, therefore, is based on the directors' subjective determinations that the proposal conforms to their sense of the meritorious.

At each stage of the proposal approval process, CPB officials make content-based determinations that prevent certain acts of expression from being created.[99] The 1979 CPB reorganization, establishing the Program Fund in order to separate directors from individual programming decisions,[100] does not alter the conclusion that CPB funding decisions are prior restraints. The CPB board will continue to make policy decisions and to set priorities for categories of programming; categorization works as an unconstitutional restraint on expression when, for example, it precludes funding for producing a particular public affairs program because the board has decided there is already a surfeit of programs of that type.[101] Furthermore, even

some other place. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (fact private auditorium is available is constitutionally irrelevant when city denies use of public auditorium to speaker); Schneider v. State, 308 U.S. 147, 163 (1939) (refusal to allow speaker's entry to proper public place cannot be justified on plea that such speech may be exercised elsewhere). Thus, the existence of private alternatives, whether they be corporate underwriters or commercial networks, cannot justify CPB decisions to withhold funding from an applicant on the basis of content.

Furthermore, Congress has determined that no alternatives to congressional support for public television programming do, in fact, exist. CPB funding for pilots and for program development is not replicated by corporate sponsors or by commercial networks. This is, for example, particularly true of CPB subsidies to independent producers, who generally have been unable to tap other sources of funding. *See Hearings on S. 2883, supra* note 24, at 380-81, 394 (independent producers, outside system, have problems obtaining money).

97. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969).

98. When censorship does occur, it is usually indirect, taking the form of rejecting story ideas or using technical problems as an excuse. *See Feedback 3: The Fourth Network*, PERFORMANCE, Sept./Oct. 1972, at 124, 131 (subtle censorship in pre-production conferences).

99. CPB's statutory authority to make decisions based on the content of the proposal or program is found in the activities section of the Public Broadcasting Act of 1967, 47 U.S.C.A. § 396(g)(2) (West Supp. 1979). CPB is charged with fostering programs of "high quality," "diversity," and "excellence." *Id.* § 396(g)(1)(A). The board carries out the statutory mandate by setting priorities for the system, by category, after assessing the needs of the system and the public and examining future requirements. *Hearings on S. 2883, supra* note 24, at 236-47.

100. *See* note 30 *supra*.

101. The Nixon Administration attempted to eliminate public affairs programming from the system. *See* NIXON PAPERS, *supra* note 86, at 61-62. Its success can be measured by the termination of "Firing Line" and Bill Moyers's "Journal" during that Administration. In addition, the National Public Affairs Center for Television budget was so severely cut that the Center eventually disappeared. *See* WASHINGTON JOUR. REV., April/May 1979, at 38.

after the reorganization, the Program Fund director must adhere to the policies and priorities promulgated by the CPB directors in making individual determinations.[102]

In making these funding decisions, CPB violates the constitutional requirement that limited government resources must be allocated in accordance with objective[103] and well-defined regulations,[104] and that governmental discretion must be bounded by "precise and clear" standards.[105] Expenditures for the erection of buildings that are intended to make speech more accessible to the public[106] and expenditures for the ancillary uses of parks, streets, and other open places as forums for expression[107] are government subsidies that can be allocated on the basis of objective criteria.[108] No such criteria are possible, however, when the subsidy is inherently dependent on a content-based determination.[109]

CPB funding determinations are not bounded by precise limitations.[110] CPB programming decisions, which bar expression from be-

102. *See* PUB. BROADCASTING REP., June 22, 1979, at 9 (director, nominated by CPB president, appointed by board, required to follow board policy). The model adopted for the Fund considerably lessened the Fund's insulation, as compared to the proposal originally contemplated. *Cf.* PUB. BROADCASTING REP., May 25, 1979, at 3 (original plan for Fund).

103. Courts hold that decisions concerning allocation of subsidies cannot be based on a subjective evaluation of the content of expression because government would be given unconstitutional license to mold the substance of the expression. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (public officials cannot engage in content review); Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (state college administrator cannot determine content of state-funded newspaper).

104. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (parade ordinance must employ "narrow, objective, and definite standards").

105. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (standard applied to use of municipal auditoriums); Niemotko v. Maryland, 340 U.S. 268, 272 (1951) (requiring limits on discretionary authority of officials to grant permits to use public parks).

106. *See, e.g.*, John F. Kennedy Center Act, 20 U.S.C. §§ 76h-76q (1976) (establishing John F. Kennedy Center for the Performing Arts); Act of Oct. 15, 1966, 16 U.S.C. §§ 284-284b (1976) (establishing Wolf Trap Farm Park).

107. Through the processing of parade permits, the administration of licensing ordinances, and the provision of police protection, government allocates its resources to facilitate and subsidize expression in areas primarily designed for recreation, traffic, or other public uses.

108. Government can constitutionally control use when a situs can only be physically occupied by one speaker at any one time. It could do so on a first-come-first-served or lowest-cost-to-the-community basis. Moreover, physical barriers and regulations authorized by the police power are justifications for limiting and allocating usage.

109. CPB and PBS funding decisions are based on standards that are inherently imprecise and demand subjectivity. *See* 47 U.S.C.A. § 396(g)(1)(A) (West Supp. 1979) (CPB to facilitate programs of "excellence"); *id.* § 396(g)(2)(B)(i) (proposals evaluated on basis of "comparative merit").

110. In fact, there are no limits on CPB discretion. *Cf. Hearings on S. 1090, supra* note 29, at 36 (remarks of Thomas Curtis, chairman, CPB) (noting plenary CPB responsibility for spending federal funds).

ing created, broadcast, or viewed, are made without constitutionally required guidelines or standards. Although it would be possible for CPB and PBS to allocate on constitutionally permissible, objective grounds, not based on comparisons of content,[111] the congressional goal of fostering the most meritorious, highest quality, expression would thereby be vitiated. Because the Public Broadcasting Act of 1967 mandates that CPB-PBS inquiries be content-specific, it is unconstitutional.

PBS funding procedures parallel the CPB process and similarly constitute an unconstitutional prior restraint on speech. PBS's general production guidelines warn that producing entities, and PBS, must be cognizant of and concerned with "taste"[112] and "controversial and adult themes"[113] and that any problems in these ambiguous areas must be resolved by adapting to community standards.[114] PBS enforces these guidelines by preparing reports on problem producers and by levying penalties for such breaches of the production agreement as a failure to comply with PBS programming standards.[115] Implementation of these vague and imprecise production criteria and the threat of lost future funding restrict program production and broadcast.

PBS's content-oriented decisionmaking process also facilitates unconstitutional preclusion of proposals and programming from the system. The procedure involves four elements: assessment of national program needs, receipt and evaluation of program proposals and ideas, establishment of priority projects, and recommendations for financing.[116] This multistage selection process makes possible proposal or program exclusion at each level of approval. Because PBS decisionmakers use "all sorts of subjective criteria,"[117] indi-

111. *See* note 108 *supra* (content-neutral allocation schemes).

112. *See* PBS, PROGRAM STANDARDS AND PRACTICES 7 (June 1972) [hereinafter cited as STANDARDS AND PRACTICES]. These areas are, PBS admits, "ill-defined." *Id.* They do not meet First Amendment requirements of precision. *See* p. 736 *supra.*

113. STANDARDS AND PRACTICES, *supra* note 112, at 9.

114. *Id.* at 11. PBS suggests production "of alternative versions of a program." *Id.* Another option is "flagging" a particular program so as to notify a station that it may be controversial. *See, e.g.,* PUB. BROADCASTING REP., Nov. 24, 1978, at 6. PBS's Programming Committee recently advised producers that "programs using language and material unsuitable for broadcast in some communities" were being produced, and that it might have to examine its "standards and practices policy to see if further steps such as the development of a code of programming practices will be necessary" because production entities judge differently "whether or not such language and material is gratuitous." *Id.*

115. *See Hearings on S. 1090, supra* note 29, at 418, 420-21.

116. *See Hearings on S. 2883, supra* note 24, at 374-78.

117. Interview, *supra* note 21; *see Hearings on S. 2883, supra* note 24, at 378 (remarks of Lawrence Grossman) (discretion and latitude of PBS programming staff in making individual recommendations and choices).

vidual programs may never be broadcast or received by the viewer if they meet with official PBS disfavor.[118] It is the use of such subjectivity in resource allocation that makes the PBS funding procedure an unconstitutional prior restraint.[119]

2. *Dissemination Decisions*

The interconnection is necessarily limited by capacity and by finite broadcast hours. Nonetheless, in operating the interconnection, PBS makes subjective, content-based decisions that therefore constitute prior restraints[120] on producers whose programs cannot be distributed, broadcasters who cannot transmit those programs, and viewers who are unable to view them.[121]

118. Even programs completed under PBS supervision are reviewed by PBS for "timing and content" prior to distribution. *See Hearings on S. 1090, supra* note 29, at 419-20.

119. The allocation problem arises whenever the resource is finite, whether due to the limited funds available for public broadcasting, or to the physical limitations of an auditorium. In wholly content-neutral inquiries, however, the process is constitutional because it denies a subsidy to the applicant or user solely for reasons that are unrelated to the content of the expression. The CPB and PBS procedures, which compare program proposals to determine their relative merits, are unconstitutional because they inextricably link the disfavored content of the expression seeking funding to a decision to allocate elsewhere; the justification for withholding the subsidy is grounded solely on the content of the proposal or program.

120. Some programs have been entirely withdrawn from the interconnection because PBS believed that their content would be objectionable to local stations. STANDARDS AND PRACTICES, *supra* note 112, at 12 (programs withdrawn available on individual station request); *see* F. POWLEDGE, PUBLIC TELEVISION: A QUESTION OF SURVIVAL 45-46 (1972) ("The Politics of Woody Allen," having escaped pre-production scrutiny, withdrawn after objections were made known to its producer); N.Y. Times, March 2, 1974, at 63, col. 3 ("Steambath," a play with semi-nudity and blasphemy, not distributed by PBS nationally). PBS content-selectivity in accepting programs for dissemination over the interconnection cannot be justified on the ground that alternatives exist for airing programs barred by PBS. *See* note 96 *supra* (discussing constitutional irrelevance of alternatives argument). As a factual matter, commercial networks generally do not transmit nationally unsolicited programs that they had no part in producing, such as those created by public telecommunications entities. There is thus no alternative interconnection for public television programming to that operated by PBS.

121. Barring a program from the interconnection might also be analyzed as an unconstitutional denial of access to a public forum. *Cf.* Chase, *Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution,* 9 U. MICH. J.L. REF. 62 (1975) (describing public broadcasting system as public forum). The public forum doctrine prohibits the government from using content as a basis for restricting use of areas set aside to facilitate expression. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (government cannot selectively exclude from forum on content bases). Access can be restricted only on objective, content-neutral grounds. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941). The *Network Project v. CPB* court imprecisely declared that "public television" as a whole does not constitute a public forum. 4 MEDIA L. REP. 2399, 2409 (D.D.C. 1979). Nevertheless, the CPB-funded and PBS-operated interconnection meets public forum criteria. *Cf.* Wolin v. Port of N.Y. Auth., 392 F.2d 83, 89 (2d Cir. 1968) (determinative factors include character, pattern of usual activity, nature of essential purpose, and population of place); 47 U.S.C.A. § 396(g)(1)(B) (West Supp. 1979)

Prior restraint by PBS occurs when it distributes a program at a less-desirable time or delays a program's release.[122] In editing programs, PBS inevitably prevents portions of programs from being viewed.[123] Moreover, PBS has directly interfered with the autonomy of individual stations, by dictating to licensees when they are to broadcast programming distributed over the interconnection.[124] Likewise, CPB has exercised control over the interconnection that undermined licensee autonomy.[125] Because CPB and PBS dissemination decisions inherently involve content-based determinations as to the allocation of a scarce resource, they constitute prohibited prior restraints on those programs not subsidized.[126]

(interconnection is for use of all public telecommunications entities to disseminate their services); *id.* § 396(h)(2) (interconnection made available to others for noncommercial programming whenever there is sufficient capacity). *See also* Comment, *supra* note 6, at 1437-60 (arguing that public forum analysis should be applied to media owned by governments, *e.g.*, state public television stations, to reconcile competing interests of public access and editorial discretion).

Prior restraint analysis, however, subsumes the public forum doctrine because it concludes that all content-based allocations of any type of subsidy, direct monetary support, or expenditures for ancillary use of public forums, are unconstitutional. *Cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553-54 (1975) (declaration that city cannot exercise "prior restraint" in barring access to the public forum of its auditorium on content-based grounds). Thus, whenever CPB or PBS acts to bar expression from the interconnection, to deny a producer access to a public forum, it is engaging in an unconstitutional prior restraint.

122. *See, e.g.*, F. POWLEDGE, *supra* note 120, at 39-43 (broadcast of segment of "Great American Dream Machine" on FBI informants delayed after FBI objections and producer's refusal to supply substitute to PBS).

123. *See, e.g., id.* (segment of "Great American Dream Machine" deleted from interconnection, ultimately broadcast in context of locally produced panel discussion on media controversies). A CPB board member kept the Nixon Administration informed as to the status of the segment by sending a memo to Clay Whitehead. *See* NIXON PAPERS, *supra* note 86, at 43.

124. PBS made a special exception to its normal policy when it required all stations to broadcast WETA's program of Vladimir Horowitz at the White House at the time of the feed if they wanted to use it thereafter. Telegram, From PBS Scheduling, To PTV Stations (Feb. 15, 1978), *reprinted in Hearings on S. 2883, supra* note 24, at 406.

125. CPB has overridden PBS operation of the interconnection to transmit programs directly to the stations. *See Hearings on S. 1090, supra* note 29, at 182 (statement of Gregory Knox). Although CPB does not regularly do so, its control is a structural possibility that makes it a potential violator of the constitutional prohibition on prior restraints in dissemination decisions. CPB power over the interconnection arises because all direct and indirect costs of maintaining and operating the interconnection system are covered under an annual PBS contract with CPB. PBS, FINANCIAL STATEMENTS 1978 AND 1977, at note 4.

126. Inherently content-based determinations are also present in the disbursement of government funds for artistic and literary speech to the National Endowments for the Arts and the Humanities (NEA/NEH), a program substantially similar to CPB. *See* National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 846 (1965), *as amended by* the Arts, Humanities and Cultural Affairs Act of 1976, Pub. L. No. 94-462, §§ 101-106, 90 Stat. 1971 (codified at 20 U.S.C. §§ 951-960 (1976)); *cf.* N.Y. Times, Oct. 21, 1979, § D, at 42, cols. 1-2 (controversy over NEH denial of funding to television film producer, based on experts' literary judgment,

3. *The Inapplicability of Judicial Exceptions that Permit Content-Based Inquiries*

Courts have recognized two situations in which the First Amendment permits subjective, content-specific allocation of a subsidy so that considerations of prior restraint never arise: restrictions by theme and the proprietary editorial privilege. Neither exception applies to, or justifies, CPB or PBS decisionmaking.

First, government may limit a subsidy for expression to applicants who will conform to a designated topic.[127] The limitation depends upon the type, or theme, of the expression. The state, therefore, may conduct a narrowly circumscribed inquiry into the content of the proposed expression to ascertain whether it is of the type the government intends to foster through the particular subsidy program. This exception to the prohibition on content-specific inquiries is inapplicable to public broadcasting because Congress specifically has

although proposal was submitted to regular system of review); Note, *Tax Treatment of Artists' Charitable Contributions,* 89 YALE L.J. 144, 154 n.30 (1979) (discussing criticism of officials' content-based funding determinations). In Advocates for the Arts v. Thomson, 532 F.2d 792, 797 (1st Cir.), *cert. denied,* 429 U.S. 894 (1976), the court held that because the standard of "artistic merit" guiding the distribution of NEA funds could not be transformed into objective criteria, the decisions to award direct monetary subsidies did not have to comply with the First Amendment requirement of precise, content-neutral, resource allocation. Moreover, although the court averred that there is no "tradition of absolute neutrality in public subsidization of activities involving speech," *id.* at 796, it gave scant consideration to the well-established content-neutrality requirement. *See* p. 736 & notes 103 & 104 *supra* (content-selection by objective criteria). The First Amendment requires, however, that subsidy programs such as those at issue in *Advocates for the Arts* and public broadcasting, which inherently and irremediably preclude expression from being created because of its content, either meet constitutional requirements or be found unconstitutional.

Direct grants for scientific research through programs such as the National Science Foundation (NSF) are distinguishable from subsidies for expression because NSF inquires into the nature of the research, not into the content of the scientific expression that ultimately may be disseminated. Government is concerned with subsidizing scientific investigation and obtaining information, not with the promulgation of expression for its own sake—the content of any consequent expression is not the object of the subsidy. *See* 42 U.S.C. § 1862(a)(1)-(7) (1976) (purpose of NSF program is research and scientific development).

The selection of books for purchase by government libraries is also distinguishable from direct, content-based, subsidies. First, libraries often use objective criteria—purchasing all of a particular publisher's publications, for example—in allocating their funds. Second, libraries may be imbued with the right of academic freedom that permits content-selectivity. *Cf.* p. 741 *infra* (entity with First Amendment, free press "editorial privilege," can be content-selective).

127. *See, e.g.,* Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632, 639 & n.9 (D.R.I. 1976) (state can inquire as to whether applicant's proposed use of public area comports with theme specified by government); *cf.* note 121 *supra* (content-based denial of access to a subsidized public forum as prior restraint).

indicated that program funding and the interconnection are not to be allocated to facilitate the expression of any particular type of speech.[128]

The second exception allows government to engage in content-based selection when it operates, as proprietor, an entity vested with free press rights.[129] In the electronic media, only the broadcast licensees, and no other entity, have such an editorial privilege.[130] CPB simply allocates the funding subsidy, performing none of the traditional press functions involved in disseminating expression directly to the public.[131] Moreover, in regulating access to the interconnection, neither CPB nor PBS is functioning as an entity of the press.[132] Thus neither entity has a constitutional privilege to make an editorial decision to deny a subsidy on the basis of content.[133]

128. *See* 47 U.S.C.A. § 396(g)(1)(A) (West Supp. 1979) (CPB to obtain programs "of high quality, diversity, creativity, excellence, and innovation . . . from diverse sources"). CPB's categorization of program proposals is, therefore, not an exception to the prohibition on non-content-neutral decisionmaking but is actually contrary to congressional intent as manifested in the Act.

129. *See* Avins v. Rutgers, State Univ. of N.J., 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968) (state university law review had editorial prerogative of rejecting article); *cf.* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1133 (C.D. Cal. 1976), *vacated on other grounds sub nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979) (government acts as editor when it delivers expression directly to the public via, *e.g.*, public school newspapers and radio and television stations); Canby, *supra* note 20 (analysis of public broadcasting system in state-as-editor framework); Comment, *supra* note 6, at 1439-46 (discussing editorial function in media owned by state).

130. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (licensee is analogous to private newspaper with "large measure of journalistic freedom"); Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1134 (C.D. Cal. 1976), *vacated on other grounds sub nom.* Writers Guild of America, West, Inc. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979) (editorial discretion afforded to broadcast licensees).

131. CPB is forbidden to produce programs or own or operate licensees. *See* p. 722 *supra.* CPB, therefore, neither speaks nor disseminates and is solely a funder for other entities that will perform a press function.

132. The interconnection does not disseminate directly to the people; its feed is always subject to the filtration of the editorial discretion of the licensee. It is not, therefore, a "press," defined as being an immediate source of information to the public. *Cf.* Comment, *Problems in Defining the Institutional Status of the Press,* 11 U. RICH. L. REV. 177, 183 (1976) (the "press" is the means for individuals to "exercise their right to receive").

133. This editorial privilege is grounded in the First Amendment guarantee of a free press. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (First Amendment guarantees free press editorial function protection from intrusion). It is distinguishable from the occasional description of the function performed by the allocator of a direct subsidy as "editorial" selection. *See, e.g.,* Network Project v. CPB, 4 MEDIA L. REP. 2399, 2409 (D.D.C. 1979) (CPB makes "editorial" decisions in determining which programs to fund). In direct subsidy cases the word "editorial" simply refers to the process of content-selection and not to the constitutional right inhering in the press; its incantation does not, therefore, carry with it the constitutional exception to the prohibition on content-based decisionmaking.

III. Severing the Nexus—A Constitutional Restructuring of the Public Broadcasting System

The constitutional problems raised by the current structure of the public broadcasting system can be avoided only if the state action nexus between the system and the government is severed. Once CPB and PBS become entirely private actors, they will not have to satisfy First Amendment proscriptions against content-based government decisions concerning expression.[134] Although one option would be to terminate all federal funding for public broadcasting, the system would then collapse, unable to generate sufficient financial support.[135] Severing the state action nexus by less radical reform is a preferable solution because it eliminates the First Amendment problems of the current system while allowing the limited federal involvement necessary to meet future revenue requirements.[136]

A. *Restructuring CPB—Carnegie II Solutions and Beyond*

Carnegie II suggested several changes in the structure of the public broadcasting system that would increase the insulation of CPB and PBS decisional processes from government control. Recognizing that the political character of the board results from the method of selecting directors,[137] Carnegie II recommended that presidential ap-

134. CPB and PBS could, as private entities, then enforce adherence to any nongovernmental balance and objectivity standard, or any prohibition on editorializing, and could select programs for funding and dissemination on the basis of content. The suggestions of this Note would not affect the status of broadcast licensees. Those noncommercial stations that are affiliated with state universities might, of their own accord, be designated state actors because of their particular ties to the state. All licensees would retain their editorial rights to select programs for broadcast. *See* note 130 *supra*. *But see* Comment, *supra* note 6, at 1455-57 (accommodate competing interests by balancing editorial discretion with right of access to state-owned media forums).

135. *See* CARNEGIE II, *supra* note 3, at 118-27, 136 (federal support must be 40% of $1.16 billion total revenue requirements of public telecommunications entities in 1985). Another option would be for Congress to appropriate a one-time lump sum to a private entity, *carte blanche*, for the development of public broadcasting programming. The legislative history of the Public Broadcasting Act of 1967 makes it clear that this alternative is not feasible because Congress is unwilling to spend federal funds without a politically accountable institutional supervisor, such as CPB. *See, e.g.*, 113 CONG. REC. 26396 (1967) (Rep. Kuykendall) ("safeguards" in statute creating CPB so Congress can control and review).

136. Elimination of the mechanisms facilitating accountability to Congress would partially disentangle government from CPB by weakening the regulatory and control strand of the state action nexus. But the nexus would remain if the funding connection is not eliminated.

137. Carnegie I had suggested that half of the directors be presidential appointees who would, in turn, select the other half. *See* CARNEGIE I, *supra* note 9, at 37. Other suggestions would have limited the membership of the board to individuals with connections to public broadcasting without altering the presidential appointment process

pointment be retained only if the President voluntarily were to select nominees from a list compiled by a statutory blue-ribbon panel, chaired by the librarian of Congress.[138] Senate confirmation of the trustees of the Public Telecommunications Trust, the institution that would replace CPB,[139] would be replaced by financial disclosure to the staff of the Library of Congress.[140]

Carnegie II also proposed the creation of an autonomous Program Services Endowment to underwrite and develop national program production in "a safe place."[141] The Endowment's directors would be selected by the trustees without presidential appointment; nominees to fill vacancies would be made to the Trust by the board of the Endowment.[142]

These recommendations represent notable improvements over the present process. Nevertheless, because the political branches would remain involved in the appointment process for the Trust, the constitutional defects of the current system are not completely overcome.[143] One alternative not considered by Carnegie II could help achieve the necessary severing of the state action nexus. The panel could select the trustees, and the Trust's board be self-perpetuating, filling vacancies as they arise. This selection scheme would eliminate the intermediate step of presidential appointment in the process and more completely sever the state action nexus that otherwise might link the CPB-Trust to the political appointees who serve on the panel.

itself. *See, e.g., Hearings on H.R. 11807, supra* note 81, at 220 (statement of William G. Harley) (members of NAEB Executive Board); *Hearings on S. 1160, supra* note 2, at 449-50 (statement of Sen. Javits) (employees of public broadcasting stations). These proposals are inadequate because they fail to depoliticize the selection process itself.

138. *See* CARNEGIE II, *supra* note 3, at 87. The panel members would be the librarian of Congress, the director of NSF, the chairmen of NEA and NEH, the secretary of the Smithsonian Institution, and one representative each from public radio and public television. Although the nominating panel would be composed of political appointees, they are nonpartisan, have no political function, and are therefore less likely to nominate individuals based on political considerations. These Carnegie II suggestions had been made in 1967 by the ACLU. *See Hearings on H.R. 6736, supra* note 2, at 773 (statement of Richard D. Heffner).

139. The Trust would report to Congress, remain accountable for federal funds, establish systemwide policies, disburse federal funds, provide equal employment opportunities, formulate long-range plans for the system, and protect programming activities lodged in the Program Services Endowment. *See* CARNEGIE II, *supra* note 3, at 82.

140. *Id.* at 88-89.

141. *Id.* at 78.

142. *Id.* at 90-91. The original board of the Endowment would be selected from nominees proposed by the panel nominating the trustees. *Id.* at 91.

143. The President would still have the discretion to select nominees whose political preferences coincided with his. Moreover, because funding would still come from congressional appropriations, the state action nexus would not be severed simply by removing politics from the process of appointment of CPB directors. *See* p. 724 *supra.*

Similarly, an added layer of insulation would be provided if the Endowment's directors themselves filled vacancies on the Endowment board, obviating the need to transmit nominations to the trustees.

Two radical possibilities for severing the political connections are licensee election of the CPB directors[144] or the abolition of CPB in favor of direct allocation of funds to PBS and to licensees. Although these approaches would sever the state action nexus, they present numerous disadvantages: they may well lead to conflicts of interest,[145] unnecessary duplication,[146] and a lessening of sensitivity to the public's expectations from public broadcasting.[147]

B. *A New Model—Severing the Funding Nexus, Financing for the Future*

No structural change, by itself, will resolve the First Amendment problems. Although creation of a Public Broadcasting Fund in the Treasury has promoted insulation,[148] the congressional accountability mechanisms and appropriations process make the Fund an inadequate solution.[149] As long as CPB, or the Trust, is funded through the appropriations process, the existence of the funding strand will ensure a finding of state action.[150] A financing model that will preclude

144. *Cf.* H.R. 12,808, 92d Cong., 2d Sess., § 201(a), 118 CONG. REC. 1724 (1972) (giving local station managers ⅔ majority on CPB board).

145. The licensees, several of which are production entities, would, in effect, be determining which among themselves received national programming grants. They could also alter the grant formula to the detriment of the few large stations and divert funding to the more numerous smaller licensees. *Cf. Hearings on H.R. 11807, supra* note 81, at 161-62 (statement of William G. Harley) (station managers on board might favor their stations in funding process).

146. A CPB board elected by the station managers would then represent a constituency identical to that of PBS. No purpose would be served in having two boards represent the licensees.

147. CPB attempts to be sensitive to public needs and encourages the public to indicate its desires. *See* YANKELOVICH, SKELLY & WHITE, INC., PUBLIC PARTICIPATION IN PUBLIC BROADCASTING (April 1977). Public participation would be lessened were the board membership to be elected by broadcasters, whose concerns are not identical to those of the public-at-large. Moreover, the diverse nonbroadcaster telecommunication entities, with interests different from licensees, would not be represented.

148. *See* 47 U.S.C.A. § 396(k)(1)(A) (West Supp. 1979) (insulated Fund in Treasury).

149. *See, e.g.*, The Hollywood Reporter, July 12, 1978, at 17, col. 2 (appropriations process makes possible congressional manipulation of the system even with an insulated Fund). To withstand constitutional challenge, federal funding could be allocated along content-neutral, objective standards such as audience share, nonfederal support, populace served, or wattage. *Cf.* Gunn, *Public Television Program Financing*, 6 EDUC. BROADCASTING REV. 283 (1972) (suggesting objective allocation formulas).

150. This situation would not be materially altered under the Program Fund created within the present CPB or the Endowment created under the Trust recommended by Carnegie II. The state action nexus would not be severed because both programming bodies would depend upon federal funds for support; each would be directly responsible to its parent, which would, in turn, be accountable to Congress.

congressional participation in the subsidy is therefore necessary to sever the funding element of the state action nexus.

The Carnegie II recommendations fail to address the state action problem posed by government financing because they are concerned only with insulation and adequate support. Carnegie II suggests that the principal source of federal funds continue to be general revenues;[151] it acknowledges, moreover, that "Congress has a legitimate oversight role in the expenditure of federal funds . . . ."[152] Carnegie II "trusts," however, that First Amendment problems will be avoided by the independent character of the trustees, insulation of the Endowment, the formula nature of the grant to the Endowment, and public support for ensuring the Trust's continued independence.[153] Although the Carnegie II financing plan could ensure continued funding, it makes no contribution to a resolution of the constitutional problem, which requires that the funding element of the state action nexus be severed.

There are several funding approaches that could achieve the necessary insulation of CPB from government control. For example, the tax laws could be used to encourage private funding for the public broadcasting system. Private donors could be granted a partial tax credit against their federal income tax liability for contributions to public broadcasting.[154] Tax credits, as compared to government appropriation, would weaken the funding nexus because individual contributing taxpayers, not Congress, would control funding of the system.[155] Another device to encourage private contributions and

151. CARNEGIE II, *supra* note 3, at 139. The Trust would receive three separate pools, one for matching grants to the stations, one for a programming grant to the Endowment, and one for funding the Trust's national activities. *Id.* at 127. This suggestion represents little change from the current model.

152. *Id.* at 138.

153. *Id.* Carnegie II bases its hopes for a system operating within constitutional bounds on the same factors that generally have proved to be futile in achieving that goal. *See* p. 728 *supra* (discussing safeguards of directorial independence, corporate autonomy, and public visibility).

154. Granting a tax credit would benefit all taxpayers, including those who are not able to make use of the current system of charitable deductions for contributions to public broadcasting entities.

155. Carnegie II rejected both the imposition of additional taxes and the use of existing taxes as a means of obtaining funding for the system without any concurrent federal control. *See* CARNEGIE II, *supra* note 3, at 140-43. It rejected manufacturers' excise taxes as burdening only one industry despite the wide dispersion of benefits of public broadcasting. *Id.* at 141; *cf.* CARNEGIE I, *supra* note 9, at 68 (suggesting financing through excise tax on television sets). It also rejected a tax on commercial broadcast advertising because it would result in commercial broadcasters financing an alternative to themselves and thereby lead to a "trade-off," a reduction in the commercial stations' public-service performance. CARNEGIE II, *supra* note 3, at 141. The imposition of a tax on the profits of commercial broadcasters was dismissed as being unduly burdensome

provide an automatic funding source would be to implement a matching grant program: donations, already tax deductible, would be matched by government funds.[156] This matching mechanism would increase the incentive to contribute because the donor would be able to direct a greater percentage of federal funds toward his charitable interests.[157] Moreover, it would replicate the existing matching method of CPB appropriations, which promotes station incentive to seek nonfederal support.[158]

The most feasible funding alternative, however, would be imposition of a spectrum-use fee on all commercial broadcasters.[159] One reason for imposing a spectrum-use fee is that the users of the spectrum, a public resource, ought to pay for such use.[160] The spectrum-

for smaller stations and as encouraging accounting deceptions by larger broadcasters and the networks. *Id.* at 141-42. It also rejected a license transfer tax, *see id.* at 142 (limited revenues, fluctuating widely), and a set-aside of commercial broadcasters' federal taxes to support public broadcasting, *see id.* at 142-43 (no new revenues, continued congressional allocation).

156. The proposal for a direct federal matching grant program, on a sliding scale, for contributions to charity is set out in detail in McDaniel, *An Alternative to the Federal Income Tax Deduction in Support of Private Philanthropy,* in TAX INSTITUTE OF AMERICA, TAX IMPACTS ON PHILANTHROPY 171, 192-209 (1972).

157. *See id.* at 201 (right to control federal funds as incentive to give). Charitable institutions would continue to receive the same share from the federal government while private contributions should increase. *See id.* at 196. Moreover, the model results in the federal government's paying the amount it currently expends while at the same time precluding government control. *See id.* at 202-03. *But cf.* Bittker, *The Propriety and Vitality of a Federal Income Tax Deduction for Private Philanthropy,* in TAX INSTITUTE OF AMERICA, *supra* note 156, at 145, 147-52 (raising constitutional, political, and privacy objections to matching grant system).

158. The direct match model, funded by a long-term appropriation to match all charitable contributions, minimizes the federal control over CPB inherent in its present biennial funding. It also is more efficient than federal support of charitable institutions through the deduction. *See* McDaniel, *supra* note 156, at 201-02.

159. *See* H.R. 3333, 96th Cong., 1st Sess. § 414, 125 CONG. REC. H1860 (daily ed. March 29, 1979) (suggesting use of "spectrum resource fee"). The bill's "spectrum resource fee" was linked to both administrative expenditures in processing a broadcasting license and the individual "scarcity value," based on a licensee's revenues, of the particular license. The fee was payable into the general fund and CPB was to be replaced by an Endowment for Program Development, financed by appropriating $1.50 multiplied by the American population. *See id.* § 614. Carnegie II argued that charging users of the spectrum would both make more efficient use of the spectrum and generate new revenues. CARNEGIE II, *supra* note 3, at 143-44; *cf.* 113 CONG. REC. 26414-15 (1967) (considering and rejecting amendment that would require FCC study of charging commercial broadcasters for spectrum-use for support of public broadcasting).

160. *Cf.* CARNEGIE II, *supra* note 3, at 382-86 (constitutional support for imposition of fee on commercial users of resource belonging to public). The rationale for levying the fee is, therefore, entirely different from that supporting a net profits tax on commercial broadcasting. *Cf.* note 155 *supra* (imposing tax on commercial licensees' profits disfavored). A spectrum-use fee, moreover, more completely separates government from funding than the imposition of a tax because there is no governmental collection of the fee, as of a tax, nor subsequent disbursal from general revenues to public broadcasting.

use fee, however, although calculated in accordance with a statutory formula, also has an independent justification: the payment directly to CPB would eliminate the government control inherent in the normal appropriations process. Use of such a fee would provide a financing system that would sever completely the funding nexus between CPB and the government.[161]

Commercial broadcasters argue that any spectrum-use fee should only be tied to the administrative costs associated with licensing.[162] In addition, some citizen groups oppose the fee because, as a political matter, it probably would be levied only in exchange for long-term or permanent broadcasting licenses, with a possible diminution of sensitivity to the public interest.[163] Nevertheless, a spectrum-use fee would provide a steady, nonfederal, source of funding for public broadcasting. As a new source of revenue, insulated from congressional allocation, it is superior to a tax because it would more effectively sever the funding nexus connecting the system to government. Coupled with the proposed structural modifications in the appointment process and the concomitant reduction in congressional regulation of public broadcasting, use of the fee would ensure that under the "totality of the circumstances" test CPB, and hence PBS, would not be state actors. With the state action nexus severed, CPB could constitutionally fund and disseminate the most "meritorious" programming for the public broadcasting system.

161. Although Carnegie II contemplated that the income realized from such a fee would be merely an offset against the statutory commitment, estimated revenues are anticipated as being as high as $150 to $200 million annually. CARNEGIE II, *supra* note 3, at 145. This would be sufficient to meet short-term needs. *Cf.* 47 U.S.C.A. § 396(k)(1)(C) (West Supp. 1979) (1983 authorization $220 million). The shortfall could be made up through increased private contributions generated both by the tax incentive proposals and by increased contributions resulting from the greater viewer appreciation and awareness of public broadcasting that will occur as UHF achieves comparability with VHF. FEDERAL COMMUNICATIONS COMM'N, *supra* note 8.

162. *See* PUB. BROADCASTING REP., Feb. 16, 1979, at 1-2.

163. *See* BROADCASTING, *supra* note 21, at 31; 125 CONG. REC. S2502, S2507 (daily ed. March 12, 1979) (remarks of Sen. Hollings) (public resource fee would be in exchange for longer or indefinite license terms).